(2)

No. 91-1548

Supreme Court, U.S.
FILED
JUN 8 1992
THE CLERK

In the
Supreme Court of the United States.

October Term, 1991

BARBARA FRANKLIN,
SECRETARY OF COMMERCE, et al.,
Petitioners

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
BEFORE JUDGMENT TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS COMMONWEALTH OF MASSACHUSETTS, et al.

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys
General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

QUESTIONS PRESENTED

Article I, Section 2, Clause 3 of the United States Constitution provides that seats in the U.S. House of Representatives "shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by [an] actual Enumeration . . . ." Section 2 of the Fourteenth Amendment modified this language by requiring that "Representatives shall be apportioned . . . counting the whole number of persons in each State. . . ." The questions presented by this case are:

1. Whether the Secretary of Commerce's decision to count overseas federal employees as residents of particular states for purposes of congressional apportionment, based on "home of record" data which the Census

Bureau had found to be "arbitrary," violated the Administrative Procedure Act.

2. Whether the Secretary of Commerce's decision to apportion overseas employees to particular states in which they did not then reside violated restrictions imposed on apportionment by the Fourteenth Amendment, considered in light of the Amendment's legislative history and contemporaneous interpretation.

3. Whether the remedy ordered by the district court, which does not affect states other than Massachusetts and Washington or the census generally, and requires solely ministerial action by government officials, was appropriate in light of the special circumstances of this case.

No. 91-1548

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BARBARA FRANKLIN, SECRETARY OF COMMERCE, et al.,
Petitioners

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
Respondents

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit

---

MEMORANDUM FOR THE RESPONDENTS COMMONWEALTH OF MASSACHUSETTS, ET AL.

The Solicitor General, on behalf of the Secretary of Commerce and the other executive branch defendants below (collectively "Secretary"), has

petitioned for a writ of certiorari before judgment to the United States Court of Appeals for the First Circuit in this case. The petition seeks review of the judgment of the United States District Court for the District of Massachusetts. According to the Solicitor, the petition was filed on a protective basis, should the Court conclude that it does not have jurisdiction over the direct appeal that the Secretary filed pursuant to 28 U.S.C. 1253 from the judgment of the district court. Petition ("Pet.") at 1. This Court noted probable jurisdiction over the Secretary's direct appeal on March 20, 1992. See Barbara Franklin, Secretary of Commerce, et al. v. Commonwealth of Massachusetts,

et al., No. 91-1502.[1/] The Court heard oral argument on the Secretary's direct appeal on April 21, 1992.

Statements of the Case, as well as the parties' arguments, are set forth in great detail in the briefs and reply

---

1/ The Commonwealth of Massachusetts and the other plaintiffs below (collectively "Massachusetts"), filed a cross-appeal from the district court judgment. See Commonwealth of Massachusetts, et al. v. Barbara Franklin, Secretary of Commerce, et al., No. 91-1571. The Commonwealth cross-appealed in order to argue: 1) that the district court erred in upholding the constitutionality of 2 U.S.C. 2a, which provides for apportionment of Representatives among the States; and 2) that a narrower judgment than the one entered by the district court would have sufficed to provide Massachusetts with the relief that it is entitled to. The first issue was resolved by this Court in United States Department of Commerce v. Montana, 112 S.Ct. 1415 (1992), and Massachusetts no longer presses that claim on appeal. The Court, however, has not yet entered an order with regard to the remaining issue presented by Massachusetts' cross-appeal.

briefs filed by the parties in the Secretary's direct appeal, and will not be repeated here. For the reasons set forth in the Petition at 5 n.3, and in the lower court's opinion, see Appendix to Jurisdictional Statement in No. 91-1502 ("J.S. App.") at 9a-14a, a three-judge court was properly convened to hear this case pursuant to 28 U.S.C. 2284(a). A direct appeal was therefore available to this Court, 28 U.S.C. 1253, and the First Circuit is without jurisdiction over the Secretary's "protective" appeal in that Court. 28 U.S.C. 1291. Correspondingly, this Court does not have certiorari jurisdiction under 28 U.S.C. 1254(1).

Nonetheless, the Commonwealth agrees with the Secretary that if the Court should conclude, notwithstanding its

noting of probable jurisdiction, that a direct appeal does not lie under 28 U.S.C. 1253, an appeal from the judgment of the three-judge court would lie in the court of appeals under 28 U.S.C. 1291. Pet. at 6. Nor does the Commonwealth oppose the Secretary's request for a writ of certiorari before judgment in the event that the Court decides that it does not have jurisdiction over the direct appeal, given the important and time-sensitive questions presented by this case.

CONCLUSION

For the foregoing reasons, the Court should hold the petition for certiorari pending dispostion of the appeal in Franklin v. Massachusetts, No. 91-1502. If the Court at any time concludes that

it does not have jurisdiction over the direct appeal, it should grant the petition for a writ of certiorari and affirm the judgment of the district court.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

Dwight Golann*
Steve Berenson
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200, ext. 2068

John P. Driscoll, Jr.
Edward P. Leibensperger
Neil P. Motenko
Special Assistant Attorneys General
Nutter, McClennen & Fish
One International Place
Boston, Massachusetts 02110
(617) 439-2000

*Counsel of Record

June 1992

3986B